LIABILITY OF A COMMON CARRIER FOR INJURY TO GOODS ACCOMPANIED BY THE OWNER. — The liability, which the law has normally imposed on the common carrier of goods, has been, since *Forward* v. *Pittard* [1] at least, the so-called liability of an insurer.[2] Whatever may be the historical explanation[3] of the imposition of this extraordinary liability it is clear that it arose as an incident to the law of bailments; the carrier is a bailee for hire.[4] Hence in determining whether or not the insurer's liability has attached with respect to any given shipment the first step in the inquiry is to see whether there has been a delivery to the carrier *qua* carrier.[5] Unfortunately it has been thought that this is the sole inquiry and that when the carrier has undertaken to transport goods in the ordinary course of his business the insurer's liability at once attaches.[6] Usually this is true.[7] But where the goods are accompanied by their owner the problem is by no means so simple.

It is conceded on the one hand that the owner may keep such exclusive control of his goods that the duty of the carrier is only that owed to a passenger.[8] On the other hand the mere fact that the owner is on the conveyance that is carrying his goods will not relieve the carrier of its "absolute" duty toward the goods.[9] To try the intermediate cases by seeking to determine whether or not there has been a bailment overlooks entirely the rational basis of the carrier's extraordinary liability, and befogs the issue with innumerable questions as to the nature of possession,

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v. Industrial Accident Commission, 177 Cal. 767, 177 Pac. 848, and the *dicta* in Rorvick *v.* North Pac. Lbr. Co., 99 Oreg. 59, 75, 87, 190 Pac. 331, 336, 195 Pac. 163, 165 (1921).

[1] 1 T. R. 27 (1785).

[2] The only exceptions to an absolute liability for all accidents at first recognized were the cases of injury from acts of God and the King's enemies. See Forward *v.* Pittard, note 1, *supra*. To this have been added acts of public officials, acts of the owner, and injury arising from the inherent nature of the goods. See THOMPSON, NEGLIGENCE, 2 ed., § 6451 *et seq.*; Edwin C. Goddard, "Liability of the Common Carrier," 15 COL. L. REV. 399, 400. Compare ELLIOTT, RAILROADS, 3 ed., § 2201.

[3] For various historical explanations of the insurer's liability of the common carrier see HOLMES, THE COMMON LAW, 180, *et seq.*; Joseph H. Beale, "The Carrier's Liability: Its History," 11 HARV. L. REV. 158; opinion of Brett, J., in Nugent *v.* Smith, 1 C. P. D. 19, 28 (1875); opinion of Cockburn, C. J., in Nugent *v.* Smith, 1 C. P. D. 423, 428 (1876).

[4] See HOLMES, *supra*; Joseph H. Beale, "The Carrier's Liability," *supra*.

[5] See Joseph H. Beale, "The Beginning of Liability of a Carrier of Goods," 15 YALE L. J. 207.

[6] That one is a common carrier means only that he is in the business of carriage. See Edward A. Adler, "Business Jurisprudence," 28 HARV. L. REV. 135. Some courts have failed to recognize that it does not follow from the mere fact of being a common carrier of goods, irrespective of the circumstances of carriage, that the carrier is under an insurer's liability. See HOLMES, *op. cit.*, 204. For cases that seem to have failed to see this distinction between the function of the common carrier and its liability see Whitmore *v.* Bowman, 4 Green (Iowa) 148 (1853); Wilson *v.* Hamilton, 4 Ohio St. 722 (1855); Pomeroy *v.* Donaldson, 5 Mo. 36 (1837). In none of these cases was the discussion of absolute liability necessary to the decision of the case. Bean *v.* Hinson, 235 S. W. 327 (Tex. Civ. App., 1921). For the facts of this case see RECENT CASES, *infra*, p. 764. *Cf.* Richards *v.* Fuqua's Adm'rs, 28 Miss. 792 (1855); Willoughby *v.* Horridge, 12 C. B. 742 (1852).

[7] See Joseph H. Beale, "The Beginning of Liability of a Carrier of Goods," note 5, *supra*.

[8] Evans *v.* Rudy, 34 Ark. 383 (1879). See Harvey *v.* Rose, 26 Ark. 3 (1870); Great Western Ry. Co. *v.* Bunch, 13 A. C. 31 (1889).

[9] Hannibal R. *v.* Swift, 12 Wall. (U. S.) 262 (1870).

and the technical requirements of a bailment, which not only are unnecessary [10] but may lead to irrational results.[11]

The carrier of passengers is held only for the results of its negligence.[12] The only argument that can be made for making its duty stricter is that in this way losses which individuals can ill afford to suffer and for which the carrier would not otherwise be liable will be shifted to the community.[13] Such a method of shifting loss can work effectively only with the larger carriers. Moreover the carrier must be allowed to charge rates that will compensate it for the insurance service that it has been forced to provide. On a true insurance basis this rate must be determined from the probability of future accidents, which in turn depends on the number of accidents that have happened. If the number of accidents per year increases, the rate must increase correspondingly.[14] Protected thus from the results of accidents the carrier will have no economic pressure put upon it to prevent them. Though the individual is protected society is not.[15] Society's interest is in the conservation of life and property. To protect this interest liability for fault must be kept sharply distinct from and unaffected by any insurance provisions which are considered in fixing rates.[16] The present duty of the carrier seems best to attain this result, rates being fixed on a basis that excludes allowance for accidents. If insurance is desired it should be effected through some independent agency, which being subrogated to the rights of the injured could hold the carrier to account when it has been at fault.

The interests that are seeking protection in the case of the carrier of goods are analogous to those seeking protection in the case of the carrier

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[10] In endeavoring to apply such a test it has been held, to avoid trouble arising from dual control of the goods, that the owner was the agent of the carrier. Fisher *v.* Clisbee, 12 Ill. 344 (1851). This reasoning is not generally accepted. See Wilson *v.* Hamilton, 4 Ohio St. 722 (1855); Wyckoff *v.* Queens County Ferry Co., 52 N. Y. 32 (1873). That the question does not turn on the sole question of whether or not there has been a bailment of property is illustrated by the refusal to impose the insurer's liability in the case of transportation of slaves. Boyce *v.* Anderson, 2 Pet. (U. S.) 150 (1829).

[11] Thus A having two suit-cases might enter a train, carrying one suit-case himself, the other being carried by a porter. The suit-cases might be put down side by side. If the duty of the carrier with respect to these suit-cases is to be tested by the fact of bailment or no bailment its duty toward one may be a duty of care and toward the other absolute. See Le Couteur *v.* London, etc. Ry. Co., 6 B. & S. 961 (1865). *Cf.* Talley *v.* Great Western Ry. Co., L. R. 6 C. P. 44 (1870). If the carrier's duty were founded on contract there would be nothing strange in this. But the carrier's duty is one imposed by law because of considerations of policy. Marshall *v.* York, etc. Ry. Co., 11 C. B. 655 (1851). See 28 HARV. L. REV. 620.

[12] Christie *v.* Griggs, 2 Campb. 79 (1809); Ingalls *v.* Bills, 9 Metc. (Mass.) 1 (1845). For a definition of the care for which the carrier is liable see Louisville, etc. Ry. Co. *v.* Snyder, 117 Ind. 435, 20 N. E. 284 (1889).

[13] See Arthur A. Ballantine, "Railway Accident Claims," 29 HARV L. REV. 705.

[14] It is obvious in view of the constantly changing methods of transportation that no rate that could be fixed upon would do for all time. In fact to set a rate which should never be changed would in effect increase the compensation of the carriers because of the constant stream of safety appliances that are being added to those now in use.

[15] It must be remembered that no scheme of insurance can protect society — it can merely spread the loss over a greater number of individuals.

[16] Theoretically it is possible to make the carrier an insurer and still permit only those losses not caused by its negligence to enter as an element in rate fixing. But this would add great administrative difficulties to the already sufficiently arduous task of fixing rates.

of passengers.[17] But there is a real difference in the way in which the two businesses are carried on. The carrier of goods usually handles them out of the sight of their owner. There is a danger that some fraud may be practiced on the latter. If there is an accident he is ignorant of the facts — he cannot easily sustain the burden of proving the carrier's negligence. These are the only rational considerations which warrant the imposing of a more onerous burden on the carrier of goods than on the carrier of passengers.[18] Where, then, the owner is present, these considerations are neutralized and the rule that the carrier is subject to an insurer's liability is totally without logical foundation.[19] This is as a fact true, when the owner accompanies his goods, and in such cases the carrier should be liable only for the results of its negligence. The cases, however, while recognizing that the rigor of the carrier's liability as an insurer should be relaxed in some cases in which the carrier does not have the exclusive control of the goods[20] have been unwilling to go so far.[21] On the other hand it should be noted that in many of the cases in which the courts purport to hold the carrier strictly to an insurer's liability the carrier was in reality liable in any event because of its negligence.[22]

ALTERATION, CERTIFICATION, AND SUBSEQUENT *BONA FIDE* PURCHASE UNDER THE NEGOTIABLE INSTRUMENTS LAW. — A recent Illinois decision makes an important contribution to the interpretation of the Uniform Negotiable Instruments Law. A St. Louis bank drew

[17] Briefly these interests are on the one hand the interest of the operators of the carrier in obtaining a fair return on their investment and for their efforts, and the social interest in having them receive a fair return so that there will be an incentive to undertake to fill the social need for transportation facilities, and on the other hand the interest of those employing the carrier in the security of their persons — or in the case of carriage of goods in the security of their acquisitions — and the social interest in the preservation of the lives and health of the members of society — or in the case of goods in the conservation of economic wealth. As far as is possible the law tries to protect all of these interests. See Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 343.

[18] How weak these considerations are is illustrated by the fact that a contract that a carrier shall be liable only for the results of its negligence is valid. Southern Ry. Co. *v.* Tollerson, 135 Ga. 74, 68 S. E. 798 (1910). But the policy underlying the rule that the carrier is liable for negligence is so strong that the parties cannot contract out of the duty to use due care. Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357 (1873). But see Edwin C. Goddard, "Liability of the Common Carrier," note 2, *supra*.

[19] The result of the shipper's presence has the effect of lessening the carrier's burden in another class of cases. If there is a contract which relieves the carrier from its absolute liability, in the case of injury to goods unaccompanied by the owner, the carrier has the burden of showing facts that will bring it within one of the exceptions of the contract. See Terre Haute & L. R. Co. *v.* Sherwood, 132 Ind. 129, 31 N. E. 781 (1892). Where the owner accompanies the goods, the burden of showing negligence is thrown on him. Zimmerman *v.* Northern Pac. Ry. Co., 140 Minn. 212, 167 N. W. 546 (1918); Colsch *v.* Chicago, etc. Ry. Co., 149 Iowa 176, 127 N. W. 198 (1910); St. Louis, etc. Ry. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134 (1888).

[20] Yerkes *v.* Sabin, 97 Ind. 141 (1884); White *v.* Winnisimmet Co., 7 Cush. (Mass.) 155 (1851). See Bean *v.* Hinson, note 6, *supra*; Fierson v. Frazier, 142 Ala. 232, 37 So. 825 (1904); Sturgis *v.* Kountz, 165 Pa. St. 358, 30 Atl. 976 (1895). See HUTCHINSON, CARRIERS, 3 ed., § 1264. But see Hannibal R. *v.* Swift, note 9, *supra*.

[21] See cases cited, notes 6 and 20, *supra*. The English rule on the whole would seem to be stricter than that of most of the American cases. Great Western Ry. Co. *v.* Bunch, note 8, *supra*; Talley *v.* Great Western Ry. Co., note 11, *supra*; Le Couteur *v.* London, etc. Ry. Co., note 11, *supra*.

[22] See Bean *v.* Hinson, note 6, *supra*.